No. 3754

United States Circuit Court of Appeals

For the Ninth Circuit

AUGUST BECHTOLD,

Appellant,

vs.

THE UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANT

Upon Appeal from the United States District Court for the District of Montana.

FRANK A. LENZ,

Appellant's Attorney.

OATES & ROBERTS PRINTERS, BUTTE

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FRANK A. LENZ,

Appellant's Attorney.

STATEMENT OF THE CASE

This Appeal, whilst made in behalf of one person only, is brought on behalf of all five defendants referred to in the District Court's order denying the petitions for Habeas Corpus and remanding the defendants back to prison from which they had been temporarily released upon the first press report of the Supreme Court's decision in the Yuginovich case. (Transcript pp. 14-18).

The indictments in all five cases are alike and the de-

fendants' punishment, after conviction, the same, to wit: Imprisonment for the term of nine months in the County Jail of Silver Bow County, Montana, and a fine of $500.

At the time of their temporary release some of these defendants lacked but 1½ months to the completion of their term; others had served smaller fractions of their terms.

All are allowed to remain at large pending the decision on appeal in the case at bar.

Motions to quash the indictment and demurrers to the same, though not submitted in all of these cases, are taken as denied and overruled by the Court.

No stenographic report of the testimony was made in these cases and there is no assignment of errors other than contained in Appellant's application for Habeas Corpus. (Transcript p. 10).

THE ARGUMENT

The indictment fixes the time of the commission of the offenses on the 12th day of July, 1920. (Transcript p. 2), the date of arrest, and the Court takes cognizance of the fact that this was: "all of date since the Volstead Act." (Transcript p. 14).

But, the decision explains: "The gist of the offences charged are not the accuseds' acts of commission, but are their acts of omission." (Transcript p 15).

This construction is in direct contradiction to the language of the first and third counts of the indictment, to-wit:

(a) "unlawfully and feloniously *did* make and ferment a certain mash" and

(b) "*did* unlawfully and feloniously carry on the business of a distiller by producing distilled spirits and making a mash."

These were the actual commissions of offenses prohibited by the XVIII Amendment to the Constitution of the United States which went into effect on the 17th day of January, 1920, and by the Statute of October 28th, 1919 (chapter 85) enforcing that amendment, and the modifying statements in the indictment:

(a) "in a certain building other than a distillery, duly authorized according to law," etc., and

(b) "without having given bond, as required by law," are the Appellee's arbitrary classification of the offenses under Sections 3282 and 3281 of the Revenue Laws (4 Fed. St. anno., pp. 44 and 41).

These are the two sections, the application of which in connection with these offenses has been adversely decided in the Yuginovich case, June 1, 1921. (United States vs. Bozo Yuginovich, 65 L. ed. 679; Advance opinions 1920-21, July 1, 1921).

"Neither that indictment nor any of these at bar, contains a word or fair inference that the object of these offenses otherwise fully charged is to devote the liquor to beverage purposes, etc." (Court's opinion, Transcript p. 15).

The defendant plaintiff in error and the other defendants concerned were arrested for:

1. making and fermenting mash.
2. having then and there in their possession and under their control a certain still set up.

3. unlawfully and feloniously carrying on the business of a distiller,

all offenses prohibited by the Volstead Act. They were not arrested for not registering their premises and stills and for not procuring a license, as prescribed by the Revenue Laws, nor is it to be assumed that they would have committed any offense against the Revenue Laws, if the registering of their places and the securing of licenses could be had for other than manufacturing purposes, to wit: for beverage purposes.

As part of the regulations for the manufacture and sale of liquors specifically allowed by the Volstead Act, Sec. 3258 R. S. is amongst those enumerated in Sec. 39 of said Act which are to remain in full force and effect, but the indictment does not contain "one word of fair inference," in the language above quoted, of an unlawful act for lawful purposes, to wit: making whiskey for manufacturing or medicinal purposes, an omission on the part of the Government just as fatal as the omission of the words "for beverage purposes."

The above numbered second cause of arrest has been arbitrarily classified as an offense forbidden by Section 3258 R. S., by the words: Having —— a still set up, *which was not then and there registered, as required by law.*

"It appears upon the face of the indictment in this case that the unlawful acts charged were committed after the 17th day of January, 1920, when the XVIII amendment of the Constitution of the United States and the Statute of October 28, 1919, enforcing that amend-

ment, took effect. (U. S. vs. Windham, 264 Fed. Rep. 376.)

The indictment in that case charges a violation of Sections 3258, 3279, 3281, R. S. (Comp. Stat., Secs. 5994, 6019, 6021.)

The Court's opinion in that case covers the present case fully. "The entire system of deriving a revenue from taxes imposed on such production and use for beverage purposes has been abrogated. On the 28th day of October, 1919, a statute was enacted covering the entire ground in providing for the inhibition of all liquors containing over one-half of one per cent of alcohol for beverage purposes, and for its permitted manufacture and use in the restricted applications allowed, exclusive of beverage purposes.

"The general rule for the construction of the Statutes is that, when a later Statute is enacted, inconsistent with one preceding it, and covering the entire ground of the subject matter, it supersedes and implicitly repeals the preceding Statute. Especially is this the case when the later Statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later Statute, is presumed to suprsede the earlier and heavier."

In United States vs. Yuginovich, 65 L. Ed. 679; Sup. Ct. Advance Opinions, July 1, 1921, the Supreme Court through Mr. Justice Day, who wrote the opinion, uses the following language concerning the applicability of Sec. 3257, Rv. St. (Fed. St. Anno. 23), which provides

the punishment for defrauding or attempting to defraud the United States of the tax on spirits, which is equally applicable to Sec. 3258, Rev. St. (4 Fed. St. Anno. 24), which provides the punishment for the unlawful possession, custody or control of any distilling apparatus, etc.; which latter statute we claim is superseded by Sec. 25 of the Volstead Act:

"The question remains concerning the applicability of Sec. 3257, involving the right to punish for attempting to defraud the United States of a tax. Did Congress intend to punish such violation of law by imposing the old penalty denounced in Sec. 3257, or as provided in the new and special provision enacted in the Volstead Act ?

It is the contention of the government that Sec. 35 saves the right to prosecute as to taxes, as well as the acts charged as violative of the other sections of the Revised Statutes, because of the phrase with which the section concludes: " . . nor shall this act relieve any person from any liability, civil or criminal, heretofore or hereafter incurred under existing laws."

"It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones, when clearly inconsistent with the earlier enactments. (United States v. Tynen,11 Wall, 88, 20 L. Ed. 153). In construing penal statutes, it is the rule that later enactments repeal former ones, practically covering the same acts, but fixing a lesser penalty. The concluding phrase of section 35 (of the Volstead Act), by itself considered, is strongly indicative of an intention to retain the old laws. But this section must be interpreted in view of the constitutional provision

contained in the 18th amendment, and in view of the provision of the Volstead Act intended to make that amendment effective."

Counsel for plaintiff in error respectfully submits that the arrest made on July 12, 1920, was made in compliance with Sec. 3 of Title II of the Volstead Act.

"Sec. 3. No person shall on or after the date when the eighteenth amendment to the Constitution of the United States goes into effect, *manufacture,* sell, barter, transport, import, export, deliver, furnish or possess any intoxicating liquor except as authorized in this Act, and all provisions of this Act shall be liberally construed to the end that the use of intoxicating liquor as a beverage may be prevented.

He was accused of making whiskey, as evidenced by the still and mash (in some of the other cases also by the finished product) found on his place. Under this charge he was brought before the United States Commissioner and was held to answer to the United States District Court for the District of Montana under bond.

More than two months later he finds himself indicted for infraction of the old Revenue laws, which in his case he could not have complied with, since the 18th amendment to the Constitution and the Volstead Act went into effect. To which indictment he pleaded "not guilty," but was found guilty and punished.

All provisions of the Volstead Act shall be liberally construed to the end that the use of intoxicating liquors as a beverage may be prevented. So that, where liquor is unlawfully manufactured it must, in the absence of all

indications that it is manufactured for a lawful purpose, be held that it is to be used or might be used for beverage purposes.

In this connection, then, the sections of the revenue laws under which the indictment herein was found, are clearly inconsistent with the provisions of the Volstead Act and the 18th amendment to the Constitution, and are superseded by them.

Respectfully submitted,

FRANK A. LENZ,

Appellant's Attorney.